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No. 07-1495

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOHN D. CERQUEIRA,

Petitioner,

v.

AMERICAN AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

49 U.S.C. § 44902(b) authorizes air carriers "to refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." For many years, the lower appellate courts have held § 44902(b) protects an air carrier's decision to refuse transportation to a passenger because of the carrier's safety concerns unless the refused passenger proves the carrier's decision to have been arbitrary or capricious at the time it was made.

Within that unique context of an air carrier's decision to refuse to transport a passenger for safety reasons, the questions presented are:

1. Whether the decision of the pilot-in-command of a commercial airliner to deny transport to a passenger may create liability for the air carrier when the decision was made based on the pilot's good-faith, reasonable belief that the passenger presented a safety risk, despite a claim that a non-decision-making subordinate's report to the pilot about the passenger's conduct was tainted by a discriminatory stereotype?

2. Whether the express authority granted by § 44902(b) should be judicially curtailed when a plaintiff alleges racial discrimination, by replacing the plaintiff's burden to prove the carrier's decision was "arbitrary or capricious" with the burden-shifting

QUESTIONS PRESENTED – Continued

and potential presumption framework outlined for Title VII cases in *McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1973)?

3. Should the authority granted air carriers by § 44902(b) simply vanish from the case when a passenger asserts a decision to deny transport was tainted by race, so that the passenger's case against the air carrier is then tried like an ordinary case of alleged discrimination in an office or restaurant, on the theory that if the air carrier's decision was influenced in any respect by unlawful discrimination, it would be *per se* arbitrary and capricious?

4. In the event the Court grants certiorari, American would present the additional question whether the district court erred by admitting a Department of Transportation Consent Decree into evidence before the jury. Because the First Circuit decided the case on other grounds, it did not reach this question except to note it was "very doubtful" about the district court's admission of the Consent Decree. *See* Pet. App. 41a n. 25.

CORPORATE DISCLOSURE STATEMENT

The caption of the case contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

The parent corporation of Respondent American Airlines, Inc. is AMR Corporation, which is publicly-traded.

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INTRODUCTION

Petitioner Cerqueira presents this case as if it were a routine alleged racial discrimination case arising on a factory floor or in an office, restaurant, or hotel. Indeed, Petitioner's first Question for Review suggests this case would be a good one to examine the issue of "subordinate bias liability" in Title VII cases, on which the Court originally granted certiorari in *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F. 3d 476 (10th Cir. 2006), *cert. dism'd,* 127 S. Ct. 1931 (2007).

As the First Circuit's opinion explains, this is not that kind of case. This case is governed by 49 U.S.C. § 44902(b), by which Congress conferred on air carriers, such as Respondent American Airlines, Inc. ("American"), the authority to "refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." 49 U.S.C. § 44902(b). Congress enacted § 44902(b) as one important means of implementing its policy that "assigning and maintaining safety [ranks] as the highest priority in air commerce." 49 U.S.C. § 40101(a)(1).

Section 44902(b) recognizes that an air carrier has a duty to protect the lives of *all* passengers and crew members aboard a commercial airliner. If the pilot-in-command of an airliner concludes, based on information that comes to him, that there "is, or might be" a safety hazard aboard his aircraft, § 44902(b) authorizes him to act to protect the safety

of the entire aircraft by removing a passenger from the aircraft before flight, provided only that his decision to do so was neither arbitrary nor capricious. It is better for the pilot to err by refusing on the ground to transport a suspicious passenger than it would be for all aboard the aircraft greatly to regret the pilot's decision not to do so after the aircraft has climbed to 30,000 feet.

Lower appellate courts, including the First Circuit in this case, uniformly have so interpreted § 44902(b).[1] *See, e.g., Cerqueira v. American Airlines, Inc.*, 520 F. 3d 1 (1st Cir. 2008) (Pet. App. 1a-42a); *Cordero v. Cia Mexicana de Aviacion, S.A.*, 681 F. 2d 669 (9th Cir. 1982); *Williams v. Trans World Airlines*, 509 F. 2d 942 (2d Cir. 1975); *Adamsons v. American Airlines, Inc.*, 444 N.E. 2d 21 (N.Y. 1982). Petitioner does not dispute this long-standing interpretation of § 44902(b). *See* Pet. 30-31.

Because this is a case falling within § 44902(b) and is fraught with the considerations Congress addressed in § 44902(b), the case would be a poor vehicle for this Court to examine issues that arise almost always in the far different, less dangerous context of employment discrimination cases. Furthermore, contrary to Petitioner's arguments, there

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[1] Prior to 1994, § 44902(b) was codified at 49 U.S.C. § 1511(a). *See* Pet. App. 22a n. 12.

are no circuit conflicts on the proper meaning or application of § 44902(b).

STATEMENT OF THE CASE

The First Circuit's opinion objectively summarizes the confluence of information on which Captain Ehlers, the pilot-in-command of American Flight 2237 scheduled to fly from Boston's Logan Airport to Fort Lauderdale early on December 28, 2003, based his decision to have state police providing security at Logan to remove Petitioner Cerqueira and two other passengers from the airplane prior to flight.[2] *See* Pet. App. 3a-16a. The other two passengers removed (neither of whom sued American) were sitting next to Cerqueira in one of the plane's emergency exit rows.

After police officers removed the three passengers from the aircraft, Captain Ehlers required all other passengers on the fully-loaded aircraft to deplane with their carry-on bags. The pilot also directed American's ground crew to empty the plane of all checked bags and cargo. He then had the aircraft searched by explosive-detecting dogs. Pet. App. 12a-13a. The events of that early morning so unnerved

[2] By Federal Aviation Regulation, "the pilot-in-command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft." 14 C.F.R. § 91.3; Pet. App. 24a.

the three veteran flight attendants assigned to Flight 2237 that they refused to work the flight even after the pilot cleared it to resume. American had to summon replacement flight attendants. Pet. App. 13a-14a.

American adopts the First Circuit's statement of the facts at Pet. App. 3a-18a by reference and presents only a summary here. American's pilot and each of the flight attendants had troubling experiences that early morning at Logan with one or more of Petitioner Cerqueira or the two other men seated next to him in an emergency exit row of the aircraft. As a result, after the flight was fully loaded and the jet bridge pulled away, the pilot met with his flight attendants to discuss their concerns. Based on his own experience with one of the other two passengers in the exit row that morning (*i.e.*, not Cerqueira) and reports he received from the flight attendants, the Captain decided not to taxi the airplane to the runway for takeoff. Instead, he re-called the jet bridge and took the flight safety precautions described above, *i.e.*, have the police remove the three passengers whose behaviors had caused concern, empty the aircraft, and have the aircraft searched by explosive-detecting dogs. *See* Pet. App. 9a-13a.

Captain Ehlers' personal encounter with one of the other two passengers, described as a man with a ponytail, occurred as the Captain arrived that morning at the gate from which Flight 2237 was to depart.

This passenger approached Ehlers and asked if he was the captain for the Fort Lauderdale flight. The Captain responded he was, and the passenger said: "Good. I'm going with you. We're going to have a good day today." Captain Ehlers, who has been employed by American since 1986, testified his conversation with the passenger with the ponytail was "probably one of the most odd exchanges that I've ever had with anyone in my whole career, and it concerned me greatly." Pet. App. 4a-5a.

After Captain Ehlers went on board the aircraft to prepare it for flight, he telephoned Flight Attendant Sally Walling, a thirty-seven year veteran with a stellar reputation (Pet. App. 10a), and asked her to check on the location of the ponytailed man. She reported he was sitting in an exit row with Petitioner Cerqueira and another man. Walling reported her perception that the three men in the exit row appeared to be traveling together. Pet. App. 5a-6a.

Walling then expressed her concerns to Captain Ehlers about Petitioner Cerqueira, sitting in the exit row with the man with a ponytail. She said early that morning, Cerqueira had approached her at the gate and was "very hostile and extremely insistent that his seat be switched to an exit row seat." Pet. App. 6a-7a. She explained to Cerqueira at the time that she was not a gate agent and could not help him. She said Cerqueira then sat down near the gate and glared at her, making her very uncomfortable. Pet. App. 7a. As Walling later walked down the jet bridge with the other two flight attendants to

take their positions on the plane, she told them Cerqueira's conduct at the gate had made her uncomfortable. Pet. App. 7a n. 4.

Flight Attendant Walling also reported her perception that Cerqueira, seated in coach, had boarded with first class passengers (which was later determined to be incorrect), and that he went into a lavatory and stayed for an extended period immediately after he boarded the aircraft. After receiving this information, Captain Ehlers sent the co-pilot to check the lavatory for explosives or other contraband. The co-pilot found nothing. Pet. App. 7a. Walling also stated her observation that Cerqueira had "an obvious interest in flight attendant duties; someone might call it staring." Pet. App. 9a. Walling reported that other passengers had expressed discomfort with statements the man with the ponytail made on the aircraft. Pet. App. 10a.

Flight Attendant Lois Sargent reported to the Captain that she gave the safety briefing to passengers sitting in the emergency exit rows, including Cerqueira, the ponytailed man, and the third man sitting with them. She said that during and after the briefing, the other two men acted bizarrely, and laughingly asked questions such as: "Is this how you want me to do it," and "Where do you want me to put the door." She reported that Cerqueira appeared to find his seat mates' antics amusing. From Sargent's personal observation, these men did not take the emergency exit row briefing seriously. She considered their behavior during the safety briefing

so unusual that she went to the front of the plane to report it to Captain Ehlers. Pet. App. 8a-9a.

The third flight attendant, Ms. Milenkovic, was assigned to the front of the aircraft. When the ponytailed man boarded the aircraft, she observed him look into the cockpit and ask Captain Ehlers: "Are you our Captain." She thought his question strange since it was obvious Captain Ehlers was the captain. Captain Ehlers also thought it strange because he had already told the same passenger in the gate area that he was the plane's captain. Pet. App. 9a.

Mr. Cerqueira's Petition stresses that in hindsight, certain of the American crew's perceptions that morning were shown to be incorrect. For example, Cerqueira was not traveling with the man with a ponytail or that man's companion and did not know them, and Cerqueira did not board until his boarding group was called. Cerqueira also points out that others of his actions – such as visiting the lavatory – certainly admit to innocent explanations. But that is not the proper way to view the collective information Captain Ehlers possessed that morning.[3] As

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[3] As Judge Weinfeld observed in a similar case, a captain's decision "must be considered against the totality of the facts as they existed at the time the captain took his action. His decision cannot be viewed in isolation separate from events that preceded it but in proper perspective as of the time of their occurrence and in relationship to one another." *Zervigon v. Piedmont Aviation, Inc.*, 558 F. Supp. 1305, 1306 (S.D.N.Y.), *aff'd*, 742 F. 2d 1433 (2d Cir. 1983).

the First Circuit held, given the confluence of information about the behaviors of the three passengers Captain Ehlers observed personally (in the case of the ponytailed man) and received from his flight attendants immediately before he was to pilot Flight 2237 to Fort Lauderdale, no reasonable jury, properly instructed, could find Captain Ehlers' decisions to protect the safety of all of his passengers and crew to have been arbitrary or capricious.

Cerqueira also challenges the decision that same morning to deny him re-booking on a later American flight and to refund his ticket price. That decision was made by Craig Marquis, the Dallas, Texas-based manager of American's Systems Operation Center ("SOC"), who made his decision after receiving a telephoned summary of the events causing the delay of Flight 2237 from Captain Ehlers. Pet. App. 16a-17a.

Petitioner Cerqueira, who testified he is of Portuguese descent, contended at trial that Flight Attendant Walling's report to Captain Ehlers was racially stereotyped because she mistakenly perceived him to be of Middle Eastern origin and thus incorrectly associated him with the ponytailed man and that man's companion because of the similarities of their "Middle Eastern" appearances. It is an unusual aspect of this case that Petitioner contends he was discriminated against because he was "perceived

to be" Middle Eastern, not because he *is* Middle Eastern.

REASONS TO DENY THE PETITION

I. This case is not within the *EEOC v. BCI Coca-Cola Bottling Co.* line of cases involving the influence of an allegedly-biased non-decision maker in employment decisions. Rather, this case is governed by § 44902(b), which pertains uniquely to air carrier safety decisions.

This case does not present a good vehicle for the Court to examine the issue of non-decision-maker bias in employment discrimination cases that Petitioner heralds as his first "issue presented." Pet. 13-21. For his references to circuit opinions addressing that issue, Petitioner cites Title VII employment discrimination cases and a few § 1981 cases arising outside the context of employment, such as in retail sales or public accommodations contexts; but he cites no other cases involving an *air carrier's* refusal to transport a passenger for safety reasons governed by § 44902(b). There are none.

As the First Circuit correctly held, this case is governed primarily by the different legal regime of § 44902(b), borne from the critical need for air safety, rather than principally by Title VII or the other discrimination statutes. The statutory language of § 44902(b) is straightforward. The statute says it is

the air carrier's decision whether to refuse to transport a passenger for safety reasons, and it says the carrier may refuse to transport if the carrier decides a passenger "is, or might be, inimical to safety."

Starting with the Second Circuit's decision in *Williams v. Trans World Airlines*, 509 F. 2d 942 (2nd Cir. 1975), the lower courts uniformly have held that

> [t]he test of whether the airline properly exercised its power under [§ 44902(b)] to refuse passage to an applicant or ticket-holder rests upon the facts and circumstances of the case as known to the airline at the time it formed its opinion and made its decision and whether or not the opinion and decision were rational and reasonable and not capricious or arbitrary in the light of those facts and circumstances. They are not to be tested by other facts later disclosed by hindsight.

509 F. 2d at 948. The First Circuit agreed with and adopted the same test in this case. Pet. App. 27a-28a. *See also Adamsons*, 444 N.E. 2d at 24-25. That test does not apply in any of the employment, retail service, or public accommodation discrimination cases Petitioner cites on pages 15-19 of his Petition, and that is the first reason why this case would not be a good one for the Court to examine the issue of non-decision-maker bias or influence in ordinary discrimination cases.

The second reason why this case is different, and a poor choice for examining the subordinate bias

issue Petitioner proffers, is that the factual circumstances of this case – and of air carrier refusals to transport for safety in general – are very different from an employment decision made in a factory or office, or a discrimination case in a restaurant or hotel.

When an air carrier makes a decision to refuse to transport a passenger for safety reasons, it thereby acts to protect the lives of all other passengers and crew members aboard the aircraft. The consequences of a timid or wrong decision can be catastrophic. That consideration does not apply in Title VII or § 1981 cases arising in employment or retail service environments.

Furthermore, in *EEOC v. BCI Coca-Cola Co.* and the other employment cases Petitioner cites, the supervisors whose decisions were at issue had the twin luxuries of time for investigation and consultation, and personal familiarity with the work and records of the subordinates and employees involved. That was not the situation in this case. As is usual in airline refusal to transport for safety situations, American's pilot-in-command had to make a decision in the minutes before takeoff about passengers he had never before seen. He was occupied with pre-flight checklists and otherwise preparing the aircraft for flight. Captain Ehlers properly considered and relied on the consistent reports of three veteran flight attendants who, unlike himself (except for his earlier encounter with the man with a ponytail), were in direct contact with the passengers.

Petitioner's suggestion that the First Circuit's decision below conflicts with the Ninth Circuit's decision in *Cordero* is incorrect. Unlike the jury in this case, the *Cordero* jury was properly instructed about § 44902(b). *See Cordero*, 681 F. 2d at 671 n. 2 & 672.[4] In affirming a judgment for consequential damages based on the jury's verdict, the Ninth Circuit observed that the "jury might have concluded that Mexicana acted unreasonably in excluding Cordero without even the most cursory inquiry into the complaint against him." That states merely an observation about the evidence, not a holding that the pilot-in-command of an aircraft must halt his

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[4] American requested jury instructions in this case similar to those given the jury in *Cordero*, but such instructions were refused by the district court, a ruling the First Circuit found to have been reversible error. Pet. App. 31a-34a. The *Cordero* jury, on the other hand, was properly instructed as follows:

> An airline is justified in refusing to transport a passenger if that transportation in the opinion of the airline, and that again, means the pilot, would be inimical to the safety of the flight. In other words, in judging the legality of a denial of passage, we look to the opinion of the airline pilot, and that opinion controls, if it's a reasonable opinion based on the facts and circumstances as they appear to the pilot at the time that the decision was made. It is not what is reasonable in the after-light, but what appears to be reasonable at the time. On the other hand, if the passenger is excluded because the opinion of the pilot is arbitrary or capricious and not justified by any reason or rational appraisal of the facts, then the denial of passage is discriminatory.

Cordero, 681 F. 2d at 671 n. 2.

preparations for flight and conduct a personal investigation into reports he has received from other crew members about their observations of passenger behavior. Indeed, in *Cordero*, the Ninth Circuit expressly held that "[t]here is . . . no duty to conduct an in-depth investigation into a ticket-holder's dangerous proclivities." 681 F. 2d at 672. The First Circuit held the same in this case. Pet. App. 29a-30a. So did the Second Circuit in *Williams*, 509 F. 2d at 947, and the Court of Appeals of New York in *Adamsons*, 444 N.E. 2d at 25. There is no conflict among the lower courts for this Court to resolve about the pilot's duty to conduct a personal investigation.

Petitioner's claim that the opinion below conflicts with the position of the United States Department of Transportation also is incorrect. Petitioner misquotes the DOT Consent Order to which he refers on page 19 of his Petition. That Consent Order states, in a footnote, that the DOT's *Enforcement Office* "strongly disagrees" with American's position and that it is the DOT *Enforcement Office's* "position that a pilot-in-command's failure to inquire independently into the reasons for such action is inconsistent with carrier's legal obligations." *American Airlines, Inc.*, DOT No. OST 2003-15046, Consent Order, June 21, 2004 at n. 2.

The proceeding before the DOT was resolved by settlement in a Consent Order. The presiding administrative law judge ("ALJ") stated American's and the Enforcement Office's respective positions about the pilot's duty to conduct a personal investigation. Petitioner's quotations on pages 19-20 of the Petition

are from the ALJ's recitation of the DOT *Enforcement Office's* position, *i.e.*, the claims DOT enforcement counsel asserted in the proceeding. The ALJ rendered no ruling on the disputed issue, nor was the issue addressed by any higher decision-making authority within DOT. Consequently, Petitioner cannot properly characterize his quotations as the "position" of DOT.

As the First Circuit below and the Courts in *Cordero*, *Williams*, and *Adamsons* uniformly have recognized, it would frustrate the purpose of § 44902(b) to require a pilot-in-command to conduct a personal investigation of reports of passenger behavior received from flight attendants, gate agents, or others. Furthermore, there is a significant safety consideration. If there are would-be highjackers or terrorists aboard the aircraft, it is not prudent for the pilot to leave the cockpit to question them in a crowded aircraft, among all other passengers. For the most part, pilots are not trained to conduct such investigations. It is far better to do what American's Captain Ehlers did in this case – to ask the trained, equipped police officers assigned to the airport to separate the individuals to be questioned from the aircraft and other passengers and then to conduct an investigation for which the police are trained.

II. There is no circuit split on whether *McDonnell Douglas* should apply in cases governed by 49 U.S.C. § 44902(b). To apply the burden shifting and presumption framework of *McDonnell Douglas* in these circumstances would conflict with established jurisprudence that a plaintiff challenging an air carrier's safety decision under § 44902(b) must prove that decision to have been arbitrary or capricious at the time it was made.

By his second issue, Petitioner contends the Court should grant certiorari to hold the *McDonnell Douglas* framework for presentation of proof in indirect evidence Title VII cases,[5] with its attendant allocations of intermediate burdens of production and potential presumptions, should also apply in trials of air carrier refusals to transport governed by § 44902(b). Petitioner cites one Ninth Circuit opinion, not published in the FEDERAL REPORTER, and several district court decisions as allegedly conflicting with the First Circuit's holding that the district court erred by giving *McDonnell Douglas* burden-shifting jury instructions in the trial below. Pet. App. 37a-39a.[6]

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[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[6] Petitioner devotes several pages of his Petition to discussing cases in which courts have applied the *McDonnell Douglas* framework outside the context of employment discrimination cases. Pet. 22-27. But none of those cases apply that framework to the different context at issue here – an air carrier's denial of service to a passenger because of safety considerations.

There is no circuit conflict. The First Circuit's opinion in this case is the first court of appeals to address the issue.

The Ninth Circuit's decision that Petitioner cites, which is *Simmons v. American Airlines, Inc.*, 34 F. App'x 573 (9th Cir. 2002), neither mentions § 44902(b) nor addresses how the *McDonnell Douglas* framework might apply to that statute's plain statement that "an air carrier . . . may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." Although the Ninth Circuit's *Simmons* opinion cites *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), which is in the Court's *McDonnell Douglas* line of Title VII cases, and discusses intermediate burden-shifting, the holding of *Simmons* was only that there existed a genuine issue of material fact and the district court had erred by granting summary judgment. That holding falls far short of creating any circuit split or conflict with the reasoned opinion of the First Circuit in this case.[7]

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[7] The district court cases Petitioner cites are not in disarray and do not demonstrate confusion in the lower courts. Pet. 25. The opinion in *Dasrath v. Continental Airlines, Inc.*, 467 F. Supp. 2d 431 (D.N.J. 2006), granted summary judgment for Continental Airlines on facts very similar to those in this case, based on § 44902(b). Although the First Circuit criticized the *Dasrath* court's following *McDonnell Douglas* burden-shifting in its opinion, the *McDonnell Douglas* structure was not essential to, and did not form the basis of, the *Dasrath* court's grant of summary judgment to Continental. The unpublished decision in

(Continued on following page)

Petitioner contends this case provides a good vehicle for examining application of the *McDonnell Douglas* framework to § 44902(b) cases because, according to Petitioner, this case can be bisected into "two separate claims of discrimination that would be resolved under different prongs of the *McDonnell Douglas* framework." Pet. 27. But Petitioner's argument is one of great factual complication and, as the First Circuit concluded after its study of the factual record, is not supported by the evidence presented at the trial of this case.

American has already discussed Captain Ehlers' decision to have Petitioner removed from Flight 2237, which Petitioner asserts was the "first" of two independent decisions that morning. For the reasons set forth in the First Circuit's decision and in this Brief in Opposition, the Captain's decision was neither arbitrary nor capricious. Rather, Ehlers' decision was an example of the attentiveness to air carrier safety

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Thompson v. Southwest Airlines Co., 2006 WL 287850 (D.N.H. 2006), did not involve § 44902(b) or the safety reasons behind that statute. The *Thompson* plaintiff sued Southwest for alleged discrimination for requiring her to purchase two seats because she was a "customer of size." Although the court mentioned the pilot's discretion under § 44902(b) in *Huggar v. Northwest Airlines, Inc.*, 1999 WL 59841 (N. D. Ill. 1999), the issue in the case was whether the passenger was discriminated against because of his race when he was removed from the airplane after he started a physical altercation with another passenger over the placement of baggage in an overhead bin. Again, the court granted summary judgment to the air carrier.

that Congress has demanded, and that § 44902(b) authorizes.[8]

Petitioner points out that Circuit Judges Torruella and Lipez[9] dissented from the First Circuit's denial of rehearing *en banc* as to the decision Petitioner characterizes as the "second" decision that morning, which was that of American's Dallas-based Systems Operations Center manager, Marquis, who told American's Boston-based supervisors that Cerqueira should not be rebooked on another American flight that day. *See* Pet. App. 64a. Judge Torruella thought the rebooking decision, made without the time urgency of Captain Ehlers' decision, may have been arbitrary or capricious. Pet. App. 69a. Judge Torruella also acknowledged, however, that the First Circuit's application of § 44902(b) to the rebooking decision was a "matter of first impression" among the circuit courts. Pet. App. 64a.

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[8] Judge Torruella, who dissented from the First Circuit's denial of rehearing *en banc*, agreed with the First Circuit panel's conclusion that Captain Ehlers' decision to remove Petitioner from the plane was neither arbitrary nor capricious. *See* Pet. App. 64a-65a.

[9] Judge Lipez concurred with Judge Torruella's dissenting opinion from denial of *en banc* rehearing, but wrote separately to identify what he perceived to be conflicting holdings among decisions within the First Circuit. Although a perceived conflict within the First Circuit is a proper consideration for that court to assess on a petition for rehearing *en banc*, it is not, without considerably more, a matter compelling the attention of the Supreme Court. *See, e.g., Davis v. United States*, 417 U.S. 333, 340 (1974).

The differences between the First Circuit's unanimous panel opinion and Judge Torruella's dissenting opinion from denial of rehearing *en banc* rest largely on different views of this specific factual record, including opposite conclusions about whether the decisions by the Captain and the SOC manager may properly be analyzed as "separate and independent decision[s]." Pet. App. 65a. As explained by the First Circuit's opinion, the record shows the SOC manager "made this decision based on the information communicated to him by the Captain, which included the Captain's information from those involved with the investigation in Boston." Pet. App. 17a, 36a, 37a & n. 19. The First Circuit concluded that "Petitioner's claim against the SOC manager's decision was derivative of the § 1981 claim against the Captain's decision." Pet. App. 36a-37a & n. 19. The district court did not submit to the jury Captain Ehlers' and the SOC manager's decisions as "separate and independent" claims of alleged discrimination.[10]

More significantly here, the First Circuit concluded there is no evidence in this record that the SOC manager's decision was based on racial discrimination, or that the SOC manager, working 1,500

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[10] The jury returned only a general verdict. It cannot be determined from the verdict whether the jury considered Captain Ehlers' decision separately from the SOC manager's decision, as Petitioner now suggests. Nor can it be determined from the general verdict whether the jury found any fact concerning the allegedly "separate" decision by the SOC manager.

miles away in Dallas, was even *aware* of Mr. Cerqueira's "appearance, race, or ethnicity." Pet. App. 37a. Consequently, regardless whether one might question, as Judge Torruella did, whether the SOC manager's decision may have been arbitrary or capricious, it certainly cannot be said, based on this trial record, that the manager's decision was influenced by race – here, the misperception of a non-decision-making flight attendant (who never spoke to the SOC manager) that Cerqueira appeared to be "Middle Eastern."

III. Neither § 44902(b) nor the safety policy it implements simply vanishes because a passenger alleges that an air carrier's refusal to transport was influenced by a racial consideration. There is no circuit conflict on this issue.

The first part of Petitioner's third "issue presented" is based on the same argument that caused jury instruction error in the district court below, which is that when a plaintiff alleges an air carrier's refusal to transport him was influenced by racial considerations, § 44902(b) simply falls out of the case, and the case should thereafter proceed as an ordinary § 1981 case as if it had arisen in an office, factory, or restaurant. Petitioner's argument is based on the claim that any air carrier decision to deny transport influenced, even indirectly, by the passenger's race is, *per se*, arbitrary or capricious and thus outside § 44902(b). So (as Petitioner's argument goes), when

a plaintiff alleges he was denied transport because of his race, the jury needs no instruction about § 44902(b) but instead should receive only the instructions given in an ordinary racial discrimination case. Petitioner's argument, if accepted, would vitiate § 44902(b) for any plaintiff who can claim he was discriminated against because of race, or as in this case, his "perceived race."

The First Circuit correctly rejected Petitioner's argument and held the district court's instructions to the jury were error because they: (1) failed to instruct about § 44902(b), Pet. App. 31a-34a; and (2) erroneously instructed that American could be held liable for the alleged bias of a non-decision-making flight attendant, despite a complete absence of evidence that the decision of the pilot-in-command, who made the decision at issue, was racially influenced. Pet. App. 34a-42a.

There is absolutely no conflict between the First Circuit's decision in this case and any other circuit court opinion addressing § 44902(b). Indeed, the First Circuit expressly agreed with, and adopted, the Second Circuit's explanation of § 44902(b) in *Williams* and the Ninth Circuit's similar explanation in *Cordero*. Pet. App. 27a-28a. As mentioned above, the district court refused in this case to give § 44902(b) instructions similar to those actually given in *Cordero*.

Petitioner quotes isolated sentences from several district court opinions to the effect that a refusal to

transport decision based only on a passenger's race would be arbitrary or capricious. American does not disagree with that statement in a vacuum, but none of those district court cases carry the logic of the statement as far as Petitioner claims they do. None held that when a passenger makes a claim of racial discrimination, all other considerations for which Congress enacted § 44902(b) disappear, that statute loses all effect, and the jury should not even be instructed about the discretion the statute confers on air carriers to act to protect safety.

In the second part of Petitioner's third issue, Petitioner tries to raise the specter of "racial profiling." There is no "racial profiling" issue in this case. Petitioner testified at trial that he was removed from the plane because he "looked like" the ponytailed man and that man's traveling companion and therefore incorrectly was associated with the suspicious conduct of those other two passengers. Cerqueira summarized his own case for the jury as follows: "if I hadn't looked like [the other two passengers], and if I hadn't happened to get seated next to them, it wouldn't have happened to me." (Appellant's Appendix in the Court of Appeals, Vol. 2, p. 278, Tr. 40-41).

Thus, giving Cerqueira every benefit of the doubt, this was, at most, a case of a mistaken identification or association by *one* flight attendant, who drew an incorrect conclusion based on the similar appearances of three men whom she did not know, but who were sitting together in an emergency exit

row.[11] That plainly is not "racial profiling," and it would present an extremely weak factual basis for this Court to undertake any analysis of alleged "racial profiling."

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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[11] The First Circuit opinion explains: "Plaintiff's theory of discrimination was that Flight Attendant Two [Ms. Walling] was motivated by discriminatory bias based on national origin, because of plaintiff's appearance as having 'dark hair' and an 'olive complexion.'" Pet. App. 6a n. 3.